No. 85

In the Supreme Court of the United States

OCTOBER TERM, 1944

CENTRAL STATES ELECTRIC COMPANY, PETITIONER

v.

CITY OF MUSCATINE, IOWA, AND ELMER E. JOHNSON, FOR HIMSELF AND THE USERS OF NATURAL GAS IN THE CITY OF GREENFIELD, IOWA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

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OPINIONS BELOW

The four opinions of the circuit court of appeals are reported as follows: opinion of May 22, 1942 (R. 36–46), 128 F. (2d) 481; opinion of June 26, 1942 (R. 55–56), 129 F. (2d) 515; opinion of June 30, 1942 (R. 60–63), 134 F. (2d) 263; opinion of September 3, 1942 (R. 67–80), 131 F. (2d) 137.

JURISDICTION

The orders of the circuit court of appeals of which review is sought were entered on February

14, 1944 (R. 129–131). The petition for a writ of certiorari was filed on May 13, 1944, and granted on June 12, 1944 (R. 156). Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the court below erred in ordering that a fund representing the excess of gas rates collected during a stay *pendente lite* of a rate order of the Federal Power Commission under the Natural Gas Act should be distributed to municipal officials on behalf of the ultimate consumers rather than to petitioner, the distributing company which had paid the rates directly and passed them on to the consumers, where such distribution was to be subject to the assertion of petitioner's claim against the fund in any other tribunal which may have jurisdiction to determine it.

STATUTE INVOLVED

The relevant portions of the Natural Gas Act of 1938 are set forth in the Appendix A, *infra*, pp. 43–50.

STATEMENT

On July 23, 1940, the Federal Power Commission, on complaint of the Illinois Commerce Commission and after extensive hearings, issued an order under the Natural Gas Act of 1938 finding that the interstate wholesale rates charged by the Natural Gas Pipeline Company and its affiliate,

Texoma Natural Gas Company, for the "resale" of natural gas "for ultimate public consumption", were excessive by at least $3,750,000 per annum, and directing these companies (hereinafter collectively referred to as "Pipeline") to file new rate schedules reducing such rates accordingly (R. 1–6). Upon petition of Pipeline, the court below on August 30, 1949, issued a temporary stay of the Commission's rate order, the stay to become effective upon the execution and delivery of a $1,000,000 bond by Pipeline to the clerk of the court below, conditioned upon Pipeline's refunding the "amount represented by the reduction in revenues" caused by the Commission's rate order, to its purchasers "at wholesale, as their several interests appear," if the rate order was ultimately sustained on review (R. 32–34). Pipeline thereupon filed a $1,000,000 bond in the court below, conditioned upon paying to its "purchasers at wholesale of natural gas" the "amounts representing the reduction in the gross revenues of * * * Pipeline * * * which shall have accrued pending judicial review" of the Commission's order (R. 31–32). Pipeline then filed a petition in the court below to review the Commission's order (R. 7–18).[1]

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[1] After the petition for review was filed, the court below dissolved its temporary stay order on November 1, 1940, and entered a new stay order "until the further order of [the circuit] court" (R. 28–29, 35), requiring as a condition thereof a bond "in all respects the same as * * * the former bond" (R. 29, 36). On December 3, 1940, Pipeline filed and the court below approved such a bond (R. 29–32).

Upon review, the court below vacated the Commission's rate order (*Natural Gas Pipeline Co.* v. *Federal Power Commission*, 120 F. (2d) 625). On March 16, 1942, this Court reversed the court below and sustained the Commission's order. *Federal Power Comm'n* v. *Pipeline Co.*, 315 U. S. 575. At that time, Pipeline contended before this Court that in the event the Commission's rate order was sustained, the fund accumulated as a result of the stay should be retained by Pipeline and should not be turned over to the wholesale distributors, because "the purpose of the rate regulation is the protection of consumers, and * * * will not be effectuated by the refunds to wholesalers" of their "profits from past business" (315 U. S. at 598). Noting that the bond was not in the record, this Court ruled (315 U. S. at 598):

> the question of the disposition of the excess charges is not before us for determination on the present record. Cf. *Morgan* v. *United States*, 304 U. S. 1, 26. Amounts collected in excess of the Commission's order are declared to be unlawful by § 4 (a) of the Act. If there is any basis, either in the bond or the circumstances relied upon by [Pipeline], for not compelling [Pipeline] to surrender these illegal exactions, it does not appear from the record.

This Court remanded the case to the court below for further proceedings in conformity with its opinion. See Mandate, Nos. 265 and 268.

October Term, 1941. Thereupon, in order to restrain suits brought against it by "ultimate consumers" in other forums, Pipeline petitioned the court below to take jurisdiction for "determination and distribution of the amounts payable" by it, representing the difference between the rates prescribed by the Commission and the higher preexisting rates which Pipeline had been permitted to charge under the stay order (R. 36–37).[2] On May 22, 1942, upon petition of Pipeline, the court below held (128 F. (2d) 481) that it had possessed equitable jurisdiction to issue a stay pending review of the Commission's rate order under Sections 19 (b) and (c) of the Natural Gas Act (R. 36–46); ruled that "as a court of equity" it had a "mandatory" obligation "to determine to whom and in what amounts the distribution shall be made" (R. 45); and observed that "all parties before the court agree that the excess charges when distributed should in equity be refunded to the ultimate consumers" (R. 39). By order of June 24, 1942, the Court accordingly took "sole and exclusive jurisdiction over the disposition of the funds" payable by Pipeline under the stay order, and enjoined all claimants thereto "from instituting, maintaining or prosecuting any suit,

[2] The accumulation of this fund began on September 1, 1940, the effective date of the Commission's rate reduction order, and ceased on March 31, 1942, when the companies put into effect the reduced rates prescribed by the Commission (R. 51, 71).

action or proceeding in any other court or jurisdiction" for the recovery thereof (R. 51–52).

In a memorandum opinion of June 30, 1942, the court below ruled that all refunds which Pipeline must make "*belong to the consumers*, for whose benefit" the Commission's rate reduction proceedings were instituted, the distributing utilities being "merely conduits, by which natural gas transported by [Pipeline] was delivered to customers by utilities"; that the "price paid" by such distributing utilities was included in "the utilities' bills to their consumers"; and that since the Commission's proceedings were instituted to reduce the natural gas cost to the distributing utilities "for the benefit of the consumers," the distribution of the fund to such utilities would constitute a "windfall" to them (R. 62). The court also directed an officer of the court to investigate and determine the administrative costs of making a refund, so as to make possible the determination of the net amount of the refund (R. 60–63). 134 F. (2d) 263. Pipeline thereupon deposited $6,377,913.52 in the court below (R. 64–65).

This fund was made up of charges collected from distributing companies, including petitioner, which purchased gas from Pipeline at wholesale and resold it for ultimate public consumption. All but two of these distributors, which had paid the excessive rates constituting more than 99% of the fund, filed statements with the court below

disclaiming any interest in the refunds, and agreeing that they should rightfully be distributed to the ultimate consumers (R. 47–50, 53, 65, 66). Of the two dissenting distributors, one subsequently settled with its consumers by turning over to them some 70% of the portion of the fund allocable to its purchases (R. 102–104). The balance of the fund except that relating to petitioner's claim was ordered to be distributed to consumers (R. 64, 67–68).[3]

The sole remaining distributor was petitioner, and on June 29, 1942, it filed a statement with the clerk of the court below claiming that the portion of the fund relating to its purchases ($25,708.54, or 4/10 of 1%) should be paid to it and not to its ultimate consumers (R. 56–59). This statement disclosed that petitioner purchased natural gas from Pipeline, but that 80% of the gas received under that contract is taken by the Iowa Electric Company (another distributor) at Pipeline's "contract rates for distribution in the city of Muscatine" and that Iowa Electric "pays the Pipeline Company directly for such gas" (R. 57).

[3] The court, at that time, in deciding which classes of natural gas consumers should be eligible for refunds, determined that consumers of natural gas sold for industrial and house heating uses should not receive any portion of the refunds, because the utility rates for these services were established on a basis "which meets competitive conditions in a particular field, rather than on a basis related solely to the costs of providing the particular service" (R. 69). No consumer or any representative of consumers has objected to this ruling.

After alleging that it was not recovering an adequate return on its investment, petitioner contended that a refund to "the individual local consumers" would amount to "a retroactive determination, without a hearing, that [petitioner] and Iowa Electric * * * have been earning an adequate return" (R. 59).

On November 24, 1942, the $25,708.54 to which petitioner laid claim was separated from the principal fund on the ground that a "distinct issue" has arisen concerning its distribution, which might impair "the distribution of the vastly greater portion [99½%] of the fund" (R. 81–82). On September 1, 1943, pursuant to leave of court (R. 115), petitioner intervened for the purpose of obtaining its alleged share of $25,708.54 (R. 105–114), and Iowa Electric at the same time disclaimed any interest therein (R. 111–112). Appended to the petition for intervention were statements setting forth (1) that there were no changes in natural gas rates in Muscatine, Iowa, from August, 1936 to February, 1943, and (2) that Iowa Electric had realized returns of 1.7% and 1.5% on its investment in the years 1940 and 1941, respectively. After receiving notification of petitioner's claim in accordance with the court's order (R. 115–116), the City of Muscatine, Iowa, and the Mayor of the City of Greenfield, Iowa, filed claims to the disputed fund as representa-

tives of the ultimate consumers in their respective communities (R. 116–121, 122–123, 126–128).[4]

Following oral argument by counsel for petitioner and the City of Muscatine (R. 126),[5] the court below on February 14, 1944, entered the two orders of which petitioner now seeks review. The first order referred to the court's prior ruling that refunds "belonged to the consumers of gas supplied by customers" of Pipeline, and recited that petitioner's claim to the $25,708.54 was based upon the alleged inadequacy of its retail rates, "a matter beyond the jurisdiction" of that court. That order denied the petition "without prejudice to [petitioner's] making claim of adjustment with the cities of Muscatine, Greenfield, Knoxville and Pella, * * * or with the consumers of gas furnished by it in said cities" (R. 129). The second order recited that the court was "desirous of paying [the fund], at the earliest possible date, to such parties as are entitled to the same, and

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[4] Sales of natural gas by petitioner were also made to consumers in the Cities of Knoxville and Pella, Iowa. These cities did not intervene or make any claim to the fund, apparently due to the court's failure to give them notice. The sales to consumers in Muscatine made up more than 80% (R. 131) and the sales to consumers in Greenfield made up about 4½% of the portion of the fund in question.

[5] The Commission did not participate in this argument since it was not served with petitioner's application for leave to intervene (R. 115–116), the response of the City of Muscatine (R. 122), the response of the City of Greenfield (R. 124), or the amended response of Muscatine (R. 128).

to permit of a determination of said rights by a court or body having jurisdiction thereof", and directed that the $25,708.54 be paid in specified amounts to the city treasurers of each of the four Iowa cities (R. 130–131).[6] A supplemental petition, in the nature of a petition for rehearing (R. 133–139) was denied (R. 146).

SUMMARY OF ARGUMENT

I

The court below, in staying *pendente lite* a rate order of the Federal Power Commission directing a reduction in the wholesale natural gas rates of Pipeline, properly impounded, as a condition of its stay, the charges exacted by Pipeline on sales made to distributing companies in excess of those prescribed by the Commission's order. In impounding those charges, the court below assumed the "duty of making disposition of the fund" representing such excess charges "in conformity to equitable principles" (*United States* v. *Morgan*, 307 U. S. 183, 191), and thereafter distributed, without protest, over 99 per cent of the fund to the distributing companies' customers—the ultimate consumers of the gas. With respect to $25,708.54 of this fund which petitioner, a local Iowa distributing company, claims is owing

[6] The order also provided that the fund should be suspended in the hands of the clerk of the court below if an appeal should be taken (R. 131, 152).

to it as against its customers, the ultimate consumers of the gas, the equities likewise indicated distribution to the ultimate consumers.

Inasmuch as petitioner passed the original cost of the gas on to its customers, to allow it to retain the reduction would give it a windfall at their expense. If the Commission's order reducing the wholesale rates paid by petitioner had immediately gone into effect, the local rate regulatory bodies (here the Iowa municipalities) would, at that point, have been free to lower petitioner's retail rates in the light of the Commission's order. Whether or not petitioner, although earning some profit, received a fair return on its investment is immaterial, inasmuch as the Commission's order did not change petitioner's position in this respect in the slightest, and since the way has always been open to petitioner to obtain increased rates upon a proper showing to the local rate-fixing authorities.

Distribution of the impounded fund in accordance with the equitable principles set forth above finds support in the legislative history of the Natural Gas Act, the provisions of the Act itself and in the consistent interpretation given to it by the Commission, the courts, and the other distributing companies occupying the same position as petitioner and having a 99½ percent interest in the funds impounded by the court below. All clearly recognize the established practice that

distributing companies such as petitioner pass on the cost of purchased gas to their ultimate consumers, and that the objective sought by the Act was the protection of these consumers from excessive rates.

Petitioner's argument that the court below had no jurisdiction to distribute the impounded funds to the ultimate consumers, on the ground that such action constituted the fixing of retail rates, disregards the distinction between the legislative function of prescribing future rates and the judicial function of distributing a fund properly impounded under a judicial stay of a rate order. Moreover, the distribution of the fund here involved did not change or affect the retail rates received by petitioner during the stay period; these were still the rates which had been prescribed by the Iowa cities.

While the bond which the court below required Pipeline to file as a condition of its stay provided for the payment of the excess charges by Pipeline to its "purchasers at wholesale," examination of the full terms of the bond in the light of several pronouncements of the court below regarding its provisions clearly shows that its sole purpose was to assure Pipeline's payment of the excess charges into court for distribution to those who were equitably entitled thereto. In addition, petitioner may not defeat the true equities of this case by a literal reading of a bond discharged before it became a

party to the proceeding. Similarly, petitioner's contention that it is entitled to the impounded fund "as a matter of legal right" disregards the fact that equitable principles, and not the strict rules of contractual privity, control the disposition of the impounded fund.

II

The final orders of the court below did not foreclose any right of petitioner to establish its claim to the impounded funds in a state court or other forum having jurisdiction thereof. The distribution thus did not prejudice petitioner's rights, if any, under local law. It is not uncommon for federal courts to relinquish their jurisdiction in favor of local forums, where the questions posed are those with which the latter may more properly deal.

ARGUMENT

The court below several times expressed its views as to the relative rights of the consumers and the distributing companies to the impounded fund. In each instance, the court ruled that the fund belonged to the ultimate consumers, and, with the consent of the distributing companies involved, the court distributed more than 99½ percent thereof accordingly.[7] In the two orders here

[7] In its opinion taking jurisdiction over the impounded fund, representing the excess rates charged by Pipeline, the court below observed that "all parties before [it] agree that the excess charges when distributed should in equity be re-

under review the court referred to its previous rulings that the refund "belongs to the consumers of gas;" recited its desire to have the fund paid "at the earliest possible date, to such parties as are entitled to the same;" and ordered it paid to the treasurers of the four Iowa cities for the benefit of the ultimate consumers "without prejudice" to the petitioner claiming "said moneys in the hands of the City Treasurers" in order to permit "a determination of said rights by a court or body having jurisdiction thereof" (R. 129–131).

While petitioner in its brief (p. 31) treats the decision below as an unqualified holding that the ultimate consumers are entitled to receive the

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funded to the ultimate consumers" (R. 39). In a later opinion considering available methods of effectuating the distribution of the impounded fund to the ultimate consumers, the court stated that "*all refunds* * * * *belong* to the consumers, for whose benefit [the rate reduction] proceedings were instituted" (R. 62). In its decree "determining the ownership" of the impounded fund, the court found "that the moneys, amounting to $6,377,913.52" belong "to the eligible ultimate consumers of the several utilities involved and should be so distributed; that none of the utilities is entitled to such funds" (R. 67). In its first order of February 14, 1944, here under review, the court referred to its prior ruling that "the refund made by * * * Pipeline * * * belonged to the consumers of gas supplied by customers" of Pipeline and denied petitioner's request that the impounded fund be distributed to it (R. 129). In its second order of that date, the court directed distribution of the $25,708.54 fund to the treasurers of the four Iowa cities, "it appearing that [the $25,708.54] belongs to the consumers of gas residing" in those cities (R. 130).

impounded fund, and contends that this decision would be *res judicata* in any further proceeding by petitioner, the orders do not necessarily have that effect. The court did not foreclose the possibility of an independent proceeding by petitioner in another forum, if there be one, having jurisdiction to hear and decide petitioner's contention that it was entitled to the refund because it had not been earning a fair return on its investment—an alleged ground which the court below thought it had no right to pass upon. Consequently, the court's ruling, as we read it, is merely that in its opinion the consumers are entitled to the fund and should receive it from the municipal treasurers, unless petitioner can establish a superior right thereto in another forum.

We shall argue in Point I that the impounded fund belongs in equity to the consumers, and hence the court properly could have ordered distribution of the $25,708 here involved directly to them. In Point II we shall argue that, in any event, since the final order of the court did not foreclose petitioner from establishing its alleged right to the fund in an appropriate forum, if any, there was no abuse of discretion in ordering the fund paid to the municipal treasurers, as representatives of the ultimate consumers, without prejudice to the assertion by petitioner of a claim thereto in such forum.

I

THE CONSUMERS ARE ENTITLED TO THE IMPOUNDED FUND

The Commission's order required a reduction in the rates chargeable by Pipeline to petitioner and other distributors. The stay of this order granted by the court below pending judicial review thereof was to become effective upon execution of a bond by Pipeline guaranteeing refunds of the excess charges to its wholesale purchasers, *i. e.*, to the distributing utilities, if the Commission's order was upheld. The bond given by Pipeline was in fact so conditioned. But the persons beneficially entitled to this refund were petitioner's customers—the consumers of the gas—from whom the excess charges had been collected by petitioner. Consequently, payment of the fund to petitioner would have been payment to a trustee bound in equity to turn it over to the beneficiaries from whom it had been originally obtained. To permit petitioner to retain the impounded funds constituting the excess charges would give it a windfall as a result of a rate reduction order intended for the benefit, not of petitioner, but of its consumers.

A

THE FUND WAS PROPERLY IMPOUNDED

In its brief, petitioner characterizes the stay of the Commission's order as "improper" and "er-

roneous" (Br. 2, 47). Petitioner nowhere explains the basis for this contention, and it is plainly unfounded. The stay was properly granted, and the fund accumulating during the operation of the stay was properly required to be paid into court for distribution to those entitled to it.

The Commission, pursuant to its statutory authority, had found unjust and unreasonable the rates charged by Pipeline for the sale of natural gas in interstate commerce "for resale for ultimate public consumption," and had ordered Pipeline to file new rate schedules reflecting a reduction of $3,750,000 per annum in operating revenues (R. 1–6). As it was entitled to do under Section 19 (b) of the Act, Pipeline sought judicial review of the rate order and requested the court below to issue a stay of the order pending review (R. 7–28). Such a stay could plainly be granted under Section 19 (c) of the Act,* and petitioner does not contend that the court below abused its discretion in issuing a stay of the Commission's order. Cf. *Scripps Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U. S. 4, 10. Since the stay would permit Pipeline to continue to charge its existing rates which had been found unjust and unreasonable, and thus collect charges

* Section 19 (c) provides in part that court review under Section 19 (b) "shall not, unless specifically ordered by the court, operate as a stay of the Commission's order."

in excess of those prescribed by the Commission, the court below, recognizing its obligation as a court of equity to grant injunctive relief only "upon conditions that will protect all—including the public (*Inland Steel Co.* v. *United States*, 306 U. S. 153, 157), directed that Pipeline, in order to obtain the stay, agree to surrender the excess charges if the Commission's order was sustained. Since the order was sustained, the funds representing the excess charges collected by Pipeline were properly paid into court. Cf. *United States* v. *Morgan*, 307 U. S. 183, 194.

B

DISTRIBUTION OF THE FUND IS GOVERNED BY EQUITABLE PRINCIPLES

Having thus properly impounded the funds, the court below clearly has comprehensive authority, as a court of equity, to distribute them fairly. *United States* v. *Morgan*, 307 U. S. 183; see *Inland Steel Co.* v. *United States*, 306 U. S. 153.[9]

In the *Morgan* case, a district court reviewing a rate reduction order issued by the Secretary of

[9] In both of these cases the courts charged with the duty of disposing of the fund accumulated by virtue of the stay were district courts rather than a circuit court of appeals. However, the pertinency of these decisions to the present case is not thereby diminished, since a circuit court of appeals, when reviewing orders of an administrative agency, acts as a court of original jurisdiction. Cf. *Indiana Quartered Oak Co.* v. *Federal Trade Commission*, 58 F. (2d) 182 (C. C. A. 2).

Agriculture under the Packers and Stockyards Act (42 Stat. 159; 7 U. S. C. §§ 181–229), granted a stay of the rate order and impounded the amounts by which the rates charged during the stay exceeded the rates prescribed by the Secretary. After the Secretary's order had been twice upheld on the merits by a three-judge district court, it was held invalid by this Court for procedural defects (*Morgan* v. *United States*, 304 U. S. 1), and the case was remanded to the district court for further proceedings. The Secretary reopened the original proceedings in order to correct the procedural errors, and moved the district court to retain the impounded funds. This Court held that the funds should be retained to await the Secretary's rate determination in order that the court might have an "appropriate basis for its action" in making an equitable distribution of the impounded funds (307 U. S., at 198). One of the "cardinal principles" which this Court ruled should be applied in distributing the fund was that a court reviewing a rate order—

> * * * sits as a court of equity, * * * and in exerting its extraordinary powers to stay execution of a rate order, and in directing payment into court of so much of the rate as has been found administratively to be excessive, *it assumes the duty of making disposition of the fund in conformity to equitable principles.* (307 U. S., at 190–191.) [Italics supplied.]

In other words, the reviewing court holds the impounded funds, representing excessive rates, "*in custodia legis*," under an "equitable duty to dispose of them according to law and justice" and "free in the discharge of that duty to use broad discretion in the exercise of its powers in such manner as to avoid an unjust or unlawful result." (307 U. S., at 193-194.) And in making distribution, the court has complete jurisdiction to protect all persons—not only the litigants, but also the "public, whose interests the injunction and the final disposition of the fund affect" (307 U. S., at 194).

C

THE EQUITIES OF THE CONSUMERS IN THE IMPOUNDED FUND ARE SUPERIOR TO THOSE OF THE DISTRIBUTORS

Tested by the pertinent criterion—the equitable right to the impounded funds—it seems clear that the claim of the ultimate consumers is superior to that of petitioner. This is demonstrated by comparing the various situations which existed as a result of the Commission's rate reduction order, the stay of the rate order, and the dissolution of the stay.

Before the Commission issued its order of July 23, 1940, directing the reduction in Pipeline's rates, petitioner was buying natural gas from Pipeline and selling it to the ultimate consumers, either directly or through an intervening dis-

tributing company. At this time, the gas involved here was distributed in Muscatine at a net profit (R. 115A), which could only mean that the rates which Pipeline charged to petitioner were included in their entirety in the rates charged the ultimate customers.

The Commission's rate reduction order was issued on July 23, 1940, and required Pipeline to file a new schedule of rates reflecting the reductions directed by the Commission. If such schedules had then been filed with the Commission and approved by it, the new rates would have immediately gone into effect, and petitioner would have received the lower charges from Pipeline. While petitioner might not *ipso facto* have been required to reduce its charges to its customers as a result of the reduction in wholesale rates, there would have been no obstacle to immediate proceedings by consumers or their municipal representatives to obtain a reduction in their rates measured by the reduction in the rates charged to petitioner. If petitioner's pre-existing retail rates were fair and just—and petitioner concedes that those rates were in effect since 1936 and without any attempt by petitioner to obtain higher rates (R. 110, 112–114)—the reduction in petitioner's operating costs resulting from the reduction in wholesale rates would immediately render petitioner's rates to its consumers excessive unless the decrease in petitioner's operating costs were

passed on to it customers in the form of reduced retail rates. In fact, such a retail rate reduction was put into effect after the wholesale rate reduction finally became operative.[10]

When the court below stayed the Commission's rate reduction order, the practical effect for the duration of the stay was the same as though the Commission had not reduced Pipeline's rates. Pipeline continued to charge the existing rates to petitioner; petitioner continued to pass these rates on to its customers; and petitioner continued to make a net profit after July 23, 1940 (R. 115A). While Pipeline was under an obligation to surrender the excess charges if the Commission's order were upheld, the Commission's order during the court's stay did not affect petitioner's operations, charges, or revenues at all. Petitioner continued to charge and collect the same rates

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[10] With the dissolution of the stay order below (R. 68), the schedule of reduced rates filed by Pipeline was approved by the Commission on April 23, 1942 (R. 68). Recognizing that the distributing companies' cost of purchased gas for retail distribution in Muscatine, Iowa, had been decreased as a result of the Commission's order, the City of Muscatine passed an ordinance on February 4, 1943, reducing the retail rates to be thereafter observed in that city (R. 113–114), thus formally passing on to the ultimate consumers the benefit of the Commission's rate order which it had previously been precluded from doing by the court's stay of that order. This adequately refutes petitioner's contention that except for the court's stay of the Commission's order, petitioner would have obtained the amount of the ordered reduction in the interstate wholesale rate during the stay period (Br. 13).

which it had been charging for some 7 years. If, as petitioner contends, it had been earning less than a fair return, there was nothing in either the Commission's rate order or in the court's stay order which prevented petitioner from instituting the requisite proceedings to obtain an increased rate. That petitioner actually did pass on to its customers the excessive wholesale rates which it paid Pipeline appears from the figures submitted by petitioner to the lower court, revealing that the gas operations in Muscatine, Iowa, not only returned all expenses, including cost of purchased gas, but in addition rendered a profit in each year during the period from 1933 through 1941 (R. 115A).[21]

The stay did, however, have a substantial adverse effect upon petitioner's consumers, since it precluded the institution of proceedings by them to obtain a lower rate from petitioner. So long as petitioner was legally required to pay the existing rates to Pipeline, as it was required to do while the Commission's order was stayed, the consumers were unable to establish before the

[21] Petitioner submitted no figures for its own operations but instead relied on Iowa Electric Company's figures showing the result of the latter's operations in Muscatine. It must, therefore, be assumed that petitioner was in no worse condition financially than Iowa Electric. More recent information available to petitioner but not submitted would probably have shown even greater profits. See Moody's *Public Utilities* (1944), pp. 848, 1653.

local rate body that they were being overcharged by petitioner. Hence, the effect of the stay order was to deprive the consumers of any right to obtain through local procedures the benefits of the rate reduction order by the Commission, a right which was successfully exercised after the stay was dissolved. Thus, the stay order did not cost petitioner a cent, while it effectively deprived consumers of the ability to obtain substantial reduction in rates during the period of the stay.

When the Commission's rate order was sustained by this Court and the excess charges were paid into the court below by Pipeline, the impounded fund in a sense represented the rate reductions which the Commission had ordered Pipeline to make in its charges to petitioner and the other distributors. But to pay that fund to the distributors would mean refunding to them excess charges for which they had already been reimbursed by their customers.

Besides bestowing a windfall upon petitioner, payment of the refund to it would prevent or render extremely difficult any attempt by consumers who bore the excess charges, and for whose benefit the rate reduction had been ordered, to recoup the excess charges during the stay period.[12]

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[12] Since the retail rates charged by petitioner during the period of the stay could scarcely be characterized as illegal, the consumers' claim to the fund in the hands of the distributors would probably depend upon the application of equitable principles which would return the excess charges to those who had sustained them, rather than to those who had

The impounded funds, if paid to petitioner, would doubtless fall in the category of additional past profits (as a retroactive reduction in the cost of gas purchased by petitioner), and hence beyond the reach of consumers, since past profits may not be considered in fixing future rates (*Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, 14; *Galveston Electric Co.* v. *Galveston*, 258 U. S. 388, 395; *Board of Public Utility Commissioners* v. *New York Tel. Co.*, 271 U. S. 23, 32; *Los Angeles Gas & Electric Corp.* v. *Railroad Commission*, 289 U. S. 287, 313).[33] Indeed, a distribution of impounded funds to a distributing company in the circumstances of this case might place a premium on delays in litigation during review of the rate order; for example, where an affiliation exists between the wholesale company whose rates are reduced and the distributing company, as is frequently the case, or where such companies agree upon the division of the impounded funds accruing during review.

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merely collected and passed them on. Distribution under equitable principles can much more effectively be made by a court already having jurisdiction of a specific fund than by a different forum asked to impress an equitable right upon an executed legal transaction.

[33] Petitioner admits that if it obtains the impounded funds, it is uncertain "Whether under Iowa law the consumers could enforce a claim against [it] by way of reparation" (Br. 45). There is no need in this proceeding to speculate as to the outcome of consumers' reparation actions to recover the funds from petitioner, for the doubt as to success is in itself an equity supporting the decree below.

The inequity of petitioner's claim to the impounded funds is highlighted by the fact that the distributing utilities occupying the same position as the petitioner and having a "conduit" interest constituting 99½ per cent of the fund, filed statements with the court below disclaiming any right to the fund and agreeing that it should be distributed to the ultimate consumers of natural gas (R. 47–50, 53, 65, 66).

D

CONGRESS INTENDED THAT RATE REDUCTIONS SHOULD BENEFIT CONSUMERS

Petitioner contends that it is entitled "as a matter of legal right" to funds impounded by the court below pending review of the Commission's rate order because that order reduced the rates charged by Pipeline to petitioner as a wholesale purchaser of natural gas (Pet. Br. 45–51). This contention disregards the conceded fact (Br. 42) that the Act is intended for the benefit of the ultimate consumers, not of the distributing utility companies. And while the reduction of the rates to distributors contemplates the use of the States' power to fix future intrastate retail rates to consumers, the true objective of the Act requires that an accumulated fund, the result of litigation over the validity of a reduction in wholesale rates and a stay of the rate order, should be distributed to those who would have benefited from the reduc-

tion in the normal course of events, but for the litigation and the concomitant stay. The interest of Congress in the consumer of natural gas, as contrasted with the producer or distributor, can be seen from the face of the Act, as well as from the underlying legislative materials.

The Congressional policy is announced in Section 1 (a) of the Act, which provides that "the business of transporting and selling natural gas *for ultimate distribution to the public* is affected with a public interest, and that Federal regulation * * * thereof * * * is necessary." To carry out this policy Section 1 (b) of the Act vests the Commission with jurisdiction over the "transportation" and "sale in interstate commerce of natural gas for resale *for ultimate public consumption.*" [Italics supplied.]

The Congressional objective of protecting the consuming public is further apparent from the provisions of the Act relating to the Commission's regulation of rates. Rate schedules showing all rates and charges subject to the Commission's jurisdiction must be filed with the Commission by the natural gas company and kept "open in convenient form and place for public inspection" (Sec. 4 (c) and 4 (d)). And when a rate schedule embodying a proposed increase in wholesale rates becomes effective, pending a determination by the Commission of the reasonable-

ness of the increase, the Commission may require the natural-gas company—

> * * * to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and *in whose behalf* such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. (Sec. 4 (a).) [Italics supplied.]

If, as petitioner contends (Br. 46), Congress intended that the portion of the wholesale rates found to be unjust and unreasonable should be returned to the distributing utilities rather than the ultimate consumers, the words "in whose behalf" would be meaningless. The only other interpretation of this section of the Act is that Congress recognized the "conduit" status of distributing companies and sought to avoid their obtaining "windfalls" at the expense of the ultimate consumers as a result of the delay which may occur between the filing of a proposed rate increase and the final determination as to its reasonableness. A similar hiatus between the promulgation of a rate reduction and its final effectiveness should certainly not be permitted to result in a windfall to the same conduit.

That excessive wholesale rates mean excessive retail rates, and that reductions in the former are necessary to obtain reasonable retail rates were fully recognized by Congress in passing the Act. Pursuant to Congressional authority (S. Res. 83, 70th Cong., 1st Sess.), the Federal Trade Commission had made a thorough investigation of the natural gas industry which disclosed excessive profits from the sale of natural gas in interstate commerce for resale to ultimate consumers, as well as other abuses with which the State authorities were unable to cope because of constitutional limitations. The investigation culminated in a report to the Senate showing that the interstate wholesale rate is the "principal item of expense to most natural gas distributing companies" and urging Federal regulation of such rates to assure a fair selling price for natural gas distributed to the general public. (Sen. Doc. 92, Part 84–A, 70th Cong., 1st Sess., pp. 474, 612–617.)

As a result, legislation was introduced which became the Natural Gas Act of 1938. Recognizing that the cost of gas purchased by distributing companies is passed on to the ultimate consumers as an operating expense, included in the retail rates, the State authorities urged passage of the Act since the absence of Federal regulation was blocking their efforts to obtain reasonable

rates for the ultimate consumers.[14] There was complete accord among all concerned with the proposed legislation that its objective was the protection of the ultimate consumers. (See excerpts in Appendix B, *infra*, pp. 51–65, from the Federal Trade Commission Report, the Committee hearings, and the Congressional debates.)

This Court has recognized that "the primary aim" of the Act "was to protect consumers against exploitation at the hands of natural gas companies" (*Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 610, 612).[15] See also *Federal Power Comm'n* v. *Pipeline Co.*, 315 U. S. 575, 583; *Public Utilities Comm. of Ohio* v. *United Fuel Gas Co.*, 317 U. S. 456, 469. The lower federal courts have also announced that the Act's manifest purpose was the "protection of the ultimate consumer and not the interested utility." *Mississippi River Fuel Corp.* v. *Federal Power*

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[14] In fixing local rates, the State commission had to allow, as an operating expense of the distributing company, whatever the latter paid the interstate pipeline company for purchased gas, and the State commission could not question the reasonableness of the claimed operating expense unless the distributing company and the pipeline company were affiliated. *Missouri* v. *Kansas Gas Co.*, 265 U. S. 298; *Western Distributing Co.* v. *Commission*, 285 U. S. 119.

[15] Mr. Justice Jackson's separate opinion in that case contains the statement that "the whole reduction" in the natural gas company's revenues "is owing to domestic users" (320 U. S. at 659). This accords with the action of the court below in excluding industrial and home-heating users from the distribution of the fund (R. 62).

Comm., 121 F. (2d) 159, 164 (C. C. A. 8); see also *Alston Coal Co.* v. *Federal Power Commission*, 137 F. (2d) 740, 741 (C. C. A. 10). And in practice almost all distributing utilities have acquiesced in the proposition that a fund, representing excessive wholesale rates, which in the nature of things were passed on to the consumers in the retail rates, belongs to the consumers. Distributors whose sales accounted for 99½ percent of the fund here involved have acceded to this principle (R. 47–50, 53, 65, 66). See also *Re Memphis Natural Gas Co.*, 52 P. U. R. (N. S.) 535, Federal Power Commission, Sept. 21, 1943, F. P. C. Opinion No. 104.

E

DISTRIBUTION OF THE IMPOUNDED FUND DOES NOT INVOLVE FIXING LOCAL RATES

Petitioner recognizes that the impounded funds should be distributed "to the person entitled thereto according to the intention of Congress as expressed in the Natural Gas Act" (Br. 46) and admits that "benefit to consumers" is the "ultimate purpose of the Act" (Br. 42). Petitioner also recognizes that the courts have "inherent equity jurisdiction to impose reasonable conditions upon granting a stay and to distribute funds accumulated in their possession, as a result of a stay, to the persons entitled thereto" (Br. 36). Petitioner argues, however, that the court below had no jurisdiction to distribute the impounded

funds to the ultimate consumers because this would involve the fixing of petitioner's rates to consumers during the stay period, which is allegedly a legislative function (Br. 31, 36–39); and that the benefits of the Act "were intended to accrue to the ultimate consumers only as a result of complementary action by State regulatory bodies" (Br. 40).

This contention disregards the basic distinction between the legislative function of prescribing rates for the future and the judicial function of distributing impounded funds representing past excessive rates collected under a stay of a rate order pending review (see *Arizona Grocery Co. v. Atchison, T. & S. F. R. R.*, 284 U. S. 370). Nothing in the decision below affects the local rates which petitioner has charged or may continue to charge to consumers. Such rates have been, at all times, those prescribed by the applicable municipal ordinances in accordance with Iowa law, and neither the Commission nor the court below has undertaken to change such rates. Petitioner has received those rates, and if the distribution to ultimate consumers is upheld, will continue to have them—although it would receive a different and greater sum if its contention is accepted. Certainly in view of the fact that petitioner has received the same retail rate, it can-

not say that the distribution ordered below has changed the rate.[16]

Petitioner's assertion that the Iowa municipalities "might have fixed a new schedule of local retail rates at any time after the entry of the interstate rate reduction order" of the Commission (Br. 44) ignores the effect of the stay order upon the Commission's rate order. The Commission's order required Pipeline to file new rate schedules on or before September 1, 1940, which would re-

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[16] *Newton* v. *Consolidated Gas Co.*, 258 U. S. 165, and *Central Kentucky Natural Gas Co.* v. *R. R. Comm'n*, 290 U. S. 264, upon which petitioner relies (Br. 38–39), are not in point. The *Newton* case held that the decree of a district court enjoining a rate as confiscatory on condition that the utility should impound the rate collected in excess thereof, could not direct disposition of the impounded fund "in accordance with any subsequently approved rate," because such action would amount to rate making (258 U. S., at 177). In the instance case, the impounded fund would be distributed without fixing past or future rates.

The *Central Kentucky* case involved an order finding a 45-cent rate set by the State Commission to be confiscatory and a 50-cent rate to be reasonable, but the court conditioned the issuance of a permanent injunction against the confiscatory rate upon the company's consent that rates in excess of 50 cents should be distributed to the company's customers. The company declined to consent to that condition, whereupon the district court ordered distribution of the impounded fund to the company's customers. This Court observed that the "practical effect" of denying the company relief from the confiscatory rates unless the company would submit to a new rate "is to make the surrender of the right to invoke a distinctively state legislative function the price of justice in the federal courts" (290 U. S., at 272).

fleet a reduction of $3,750,000 per annum in the company's operating revenues. In such order, the Commission specifically reserved "the right to reject all or any part of such schedules and in lieu thereof to prescribe the same by further order" (R. 5). Hence, the form or amount of the reduction in Pipeline's rates to the various distributing companies, such as petitioner, could not be known until the new rate schedules were filed by Pipeline and approved by the Commission. The stay order relieved Pipeline of the necessity of filing new rate schedules pending review of the Commission's order, and such schedules were not filed and approved until April 23, 1942 (R. 68), almost two years after the Commission's rate reduction order was issued. Accordingly, the Iowa municipalities were not in a position to obtain a reduction in the local rates during the stay period since they could not know to what extent the rates charged by Pipeline to petitioner would be reduced, if at all. The court imposing the stay and, to that extent, delaying the benefits of the Commission's order to consumers, thus had the concomitant responsibility of protecting their interests through a proper distribution of the impounded funds.

F

THE BOND REQUIRED BY THE COURT BELOW AFFORDS PETITIONER NO RIGHTS TO THE FUND

In claiming the impounded fund "as a matter of legal right," petitioner urges that the bond

required by the court below was "expressly conditioned for the benefit" of distributors (Br. 49). While it is true that the bond provided for the payment of the excess charges by Pipeline to its "purchasers at wholesale * * *, as their several interests appear," the bond also contained an express acknowledgment that Pipeline was "firmly bound to the Federal Power Commission and the Illinois Commerce Commission in the sum of One Million Dollars" (R. 30), and both Commissions were acting for the benefit of the ultimate consumers throughout this proceeding (R. 63, 67). At an early stage of the proceedings the court below, which had required filing of the bond, construed it as enuring to the benefit of the consumers and not of the distributing utilities.

The court referred to the bond in its opinion as running "in favor of the Federal Power Commission and the Illinois Commerce Commission" (R. 37), and stated that the condition in the bond "for the payment of money" was "a requirement made to protect the interests of all those whom [the] injunction affected" (R. 43). Obviously, the court which entered the order requiring the filing of the bond could interpret or modify its own direction. The only parties with standing to object would have been those bound by the bond—Pipeline and its affiliate—and they did not do so. Consequently, when the bond was thereafter discharged by payment

of the money into court, no one could have relied upon or been misled by a construction of the bond "according to the letter and not according to the substance" (cf. *Arkadelphia Co.* v. *St. Louis S. W. Ry. Co.*, 249 U. S. 134, 144). Prior to the cancellation of the bond, petitioner was put on notice of its proposed cancellation by a letter from the clerk of the court dated June 11, 1942 (R. 56), but did not seek to intervene in this proceeding until September 1, 1943 (R. 105), some fifteen months after the bond had been cancelled. As intervenor, petitioner had to accept the case as it found it (*United States* v. *California Canneries*, 279 U. S. 553, 556; *Vinson* v. *Washington Gas Company*, 321 U. S. 489, 499), and has no right to rely upon the wording of a bond discharged before it became a party. By payment of the excess charges into the custody of the court, Pipeline discharged its liability under the bond, pursuant to the court's order of June 26, 1942 (R. 54–55). Certainly, petitioner cannot defeat the true equities of the ultimate consumers in the impounded funds by a literal reading of provisions in a virtually nominal bond (see R. 37), cancelled long prior to petitioner's intervention in this proceeding.[17]

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[17] The bond was merely security to insure the payment of the impounded fund. That the bond was not the equivalent of the fund appears from the fact that it amounted to only a million dollars, whereas the amount actually distributed was over six million dollars.

Regardless of the language of the bond, the court below was—

> charged both with the responsibility of protecting the fund and of disposing of it according to law, and free in the discharge of that duty to use broad discretion in the exercise of its powers in such manner as to avoid an unjust or unlawful result. It entered into no contract or understanding with the litigants; it entered into no undertaking as to the manner of disposing of the fund; its duty with respect to it is that prescribed by the applicable principles of law and equity for the protection of the litigants and the public, whose interests the injunction and final disposition of the fund affect. (*United States* v. *Morgan*, 307 U. S., at 193–194.)

To support the contention that it is entitled to the refund "as a matter of legal right", as "the person who paid the excessive rates" to Pipeline during the refund period (Br. 49), petitioner relies upon *Southern Pacific Company* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531, which involved the liability of a carrier for reparations (Br. 47–48). The short answer is that this is not a reparation proceeding.

The issue in a reparation proceeding is the liability of a utility to refund or not to refund excessive rates previously collected. As the *Southern Pacific* case makes clear, a carrier in such a proceeding cannot evade the obligation to make re-

fund by asserting that the party seeking reparation may have passed on the excessive charges to someone else. Obviously, if such a defense were available, the carrier could almost always retain the excess charges because shippers pass on freight charges as an economic matter. But in the instant proceeding, the liability of the party which had exacted the excessive rates is no longer in issue, having been decided by this Court in 315 U. S. 575. The excess charges have been paid into court, and the dispute is limited to the proper disposition of the fund in judicial custody. There is no question of releasing Pipeline from its obligation to surrender the overcharges merely because petitioner has passed on those charges to its customers. And since the disposition of the impounded funds is controlled by equitable principles (*United States* v. *Morgan*, 307 U. S. 183), strict rules of contractual privity should not be permitted to produce a "windfall" to petitioner contrary to the equities of the situation. As the lower-court observed, "It would be a gross travesty upon the proceedings" if petitioner were to succeed in its endeavor "to seize the fruits of the litigation brought for the consumers and retain the money for [its] own individual gain" (R. 63).

We submit, in the light of the foregoing, that the court below was correct in ruling that the excessive rates charged by Pipeline "*belong to the consumers*, for whose benefit [the Commission's

rate reduction] proceedings were instituted," and that the distributing utilities are "merely conduits, by which natural gas transported by [Pipeline] was delivered to customers" by distributing utilities (R. 62).

II

PETITIONER'S CLAIM AGAINST THE FUND WAS NOT FORECLOSED BY THE ORDER BELOW

Although we believe that the court below could properly have ordered payment of the impounded funds directly to the ultimate consumers, the orders below in any event do not foreclose the assertion of petitioner's alleged rights to the fund in another forum.

Petitioner's claim to the impounded fund in the court below was based primarily upon the contention that it was receiving less than a reasonable return upon its investment, and hence that it is entitled to retain some or all of the rate reduction to make up the past deficiency (R. 56–59, 106–111). In the first of its two orders of February 14, 1944 (R. 129–131), the court below stated that "the reasonableness of petitioner's rates" was "a matter beyond [its] jurisdiction," and after adverting to its previous ruling that the refund "belonged to the consumers of gas," the court denied petitioner's claim to the refund. In the second order of that date, the court below ordered the refund to be paid to the representatives of the consumers, after once again finding

that the "refund belongs to the consumers of gas residing in" Muscatine, Greenfield, Knoxville and Pella. But both orders were made "without prejudice" to petitioners claiming "said moneys in the hands of the City Treasurers of the said cities" (R. 129–130), or to a "determination of said rights by a Court or body having jurisdiction thereof" (R. 130).

The opportunity thus afforded petitioner to assert its claim to the impounded fund in another forum can hardly be characterized as "meaningless" (Pet. Br. 31) or as an abuse of discretion. As the court below observed (R. 129), petitioner's claim was based "on the ground that its gas rates are, and have been inadequate," thus raising the issue of the reasonableness of the rates charged to local consumers during the stay period. Municipal representatives of ultimate consumers in Iowa denied this contention. The resulting conflict manifestly raised issues with respect to local retail rates determinable under Iowa law. Whether or not the court below had jurisdiction to determine them in the present proceeding (cf. Sections 1 (b) and 19 (c) of the Natural Gas Act), we think it clear that they could properly be left for consideration and disposition in a state forum. For it is not improper or uncommon for federal courts of equity, when asked to dispose of or adjudicate "private rights" in property subject

to their control, "to relinquish their jurisdiction in favor of the state courts," where its exercise concerns a matter which may more properly be settled by a state court or pursuant to a state procedure. *Pennsylvania* v. *Williams*, 294 U. S. 176, 185; cf. *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496; *Burford* v. *Sun Oil Co.*, 319 U. S. 315. The "exercise of a 'sound discretion, which guides the determination of courts of equity,'" often "calls for a remission of the parties to the state courts, which alone can give a definitive answer to the major questions posed." *Chicago* v. *Fieldcrest Dairies, Inc.*, 316 U. S. 168, 172.

In substance, this was the effect of the orders below. The transfer of the refunds to the municipal treasurers made them subject, under the terms of the orders, to appropriate state proceedings. The responsibility of the treasurers as stakeholders has not been questioned, and no showing has been made that adequate local procedures are not available to test petitioner's alleged right to the fund. Consequently, the court below clearly did not abuse its discretion by refusing definitively to determine the respective rights of petitioner and the ultimate consumers to a minute fraction (less than ½ of 1 per cent) of a fund already otherwise fully distributed to consumers without objection.

CONCLUSION

The judgment below should therefore be affirmed.

Respectfully submitted.

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NOVEMBER 1944.

APPENDIX A

The pertinent provisions of the Natural Gas Act of 1938, c. 556, 52 Stat. 821 (15 U. S. C. § 717 *et seq.*) are as follows:

SECTION 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

* * * * *

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas sub-

ject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this Act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice

shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect,

the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

FIXING RATES AND CHARGES: DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing com-

pany, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

* * * * *

REHEARINGS; COURT REVIEW OF ORDERS

SEC. 19. (a) Any person, State, municipality, or State commission aggrieved by

an order issued by the Commission in a proceeding under this Act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was

entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

APPENDIX B

Legislative History of Natural Gas Act of 1938

Final report of the Federal Trade Comm. to the Senate, Sen. Doc. 92, Part 84–A, 70th Cong., 1st Sess.

CONCLUSIONS AND RECOMMENDATIONS

At p. 611:

"These, basically, are the problems presented by the natural-gas and natural-gas pipe-line industry. Because of the importance of natural gas as a national resource, the serious extent to which its supply is being depleted through uneconomical consumption and waste, the fact that a great part of the natural gas produced in the United States travels across many State boundaries, the apparent inability of the States unaided to meet the requirements of the situation presented, the serious abuses which have arisen in the industry by reason of the absence of regulation of interstate gas pipe-line companies, and the insistent and well-founded demands of communities, some even located in or near the producing area or reasonably adjacent to existing lines, not loaded to capacity, for the benefits of natural gas for their industries and for the general consuming public, the situation presents a strong claim for such remedial aid on the part of the Federal Government as may lawfully be granted.

* * * * *

"There are about 7,000,000 consumers of natural gas, the vast majority in number being classed as domestic, commercial, and small industrial consumers, service to whom is of a public-utility character, with the consequent obligation on the part of purveyors to provide an adequate, dependable, and safe service at reasonable rates."

* * * * *

At p. 612:

"The problem of a fair selling price for natural gas when distributed to the general public, if that price is to be determined by a fair return on the investments involved above necessary operating expenses, taxes, and fair allowances for depreciation, etc., is, in very many communities, much concerned with the fair charges for natural gas transported interstate and delivered to intrastate operations for local distribution. State and other local authorities have no power to fix rates for such interstate service. The city gate rates for natural gas, however, are often the critical element in regulation of local rates."

* * * * *

At p. 614:

"Wholesale rates for gas delivered in interstate commerce should be regulated in all cases, as the States are without power to fix them (*Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83 (1927)). Security issues and accounts of companies owning and controlling interstate pipe lines should be regulated, because of the intimate relation these matters bear to rates, and the interest which the public has in their effective control. The beginning of opera-

tion and extension of lines in interstate commerce should also be subjected to supervision, as well as the abandonment of operations. Further, there should be control of intercorporate relations, including the sale of the property or stock of an interstate pipe-line company to another corporation of any character.

"Such regulation should be effective but impose no undue restrictions on the industry. It should not invade the realm of management. It should make possible the protection of the public interest in a field surrendered too long to the unrestricted play of economic and other forces and to a few large interests that are already dominant in the field."

CONG. REC'D 75TH CONG. 1ST SESS., VOL. 81, P. 6721

P. 6721:

"Mr. LEA. Mr. Chairman, I yield myself 10 minutes. Mr. Chairman, as stated by the chairman of the Rules Committee, this bill was reported unanimously by the Interstate and Foreign Commerce Committee.

"The statistics of the last 12 years tell an amazing story in reference to the gas industry of the United States. Today we have over 50,000 wells, located in 24 States, furnishing gas to consumers in 35 States. There are about 8,000,000 consumers in these 35 States.

"In 1934, 1,770,000,000,000 cubic feet of gas was produced in this country. For this gas the consumers paid $394,000,000; of which amount $260,000,000 was paid for gas transported in interstate commerce.

"Today we have 65,000 miles of gas-main pipe lines in the United States. In 1930, 302,000,000,-

000 cubic feet of gas was transported in interstate commerce. The amount today is the figure I just stated. Today over 41.5 percent of the gas produced in the United States moves in interstate commerce.

"The domestic rates paid by the consumers at the present time is: For domestic use, 74.6 cents per 1,000 cubic feet; for commercial use, 49.6 cents; and for industrial use, 16.9 cents.

"From 1934 to March 1936, the Federal Trade Commission investigated the gas industry for the purpose of recommending legislation to Congress. Thirty-six of the thirty-eight interstate gas companies reporting to the Federal Trade Commission reported a ledger value of these companies of $1,600,000,000. This is the statistical background that gives the setting for this legislation.

"The primary purpose of the pending bill is to provide Federal regulation, in those cases where the State commissions lack authority, under the interstate-commerce law. This bill takes nothing from the State commissions; they retain all the State power they have at the present time. This bill would apply to the transportation of natural gas in interstate commerce and to the sale of natural gas in interstate commerce for resale or public consumption.

* * * * *

"The object of this bill is to supply regulation in those cases where the State commission has no power to regulate.

"There are, however, some situations defined in the bill to which this regulation does not apply.

One is local distribution on the principle that where commerce passes in interstate commerce and reaches the point of broken package, the local State commission then has the regulatory power. That same general rule applies to the transportation and sale of gas. So this act does not affect the local distribution of gas. It affects the local consumer's price only by regulating the price at the city gates. The facilities for local distribution are not within the power of regulation provided in the bill."

P. 6722:

"Mr. BEVERLY M. VINCENT. Will not the effect of this bill be to limit the competition in any field, or in any State?

"Mr. LEA. It will be left to the Federal Power Commission.

"Mr. BEVERLY M. VINCENT. And will not this regulation tend to increase the price to consumers?

"Mr. LEA. No; it will not. The State commissions have been very strong in supporting this bill; believing it will save millions of dollars to the consumers of the country."

P. 6723:

"Mr. WOLVERTON. Mr. Chairman, the purpose of this bill is to provide Federal regulation and control of the interstate transportation and sale of natural gas.

"Over a period of years the need for this type of legislation has become increasingly apparent. The State regulatory bodies have wide and comprehensive jurisdiction to fix rates and otherwise regulate and control the sale of natural gas to

consumers within the State but do not have any jurisdiction in fixing the rate to the distributing company or the municipality when the purchase of the gas is made from an outside source. This comes within the field of interstate commerce and the jurisdiction over such is denied entirely to the State regulatory bodies and lodged completely in the Federal Congress.

"It can be readily seen that the price to be paid by the consumer depends largely upon the price the local distributing company or municipality has been required to pay to the outside producer. Therefore, if the consumer is to be given the benefit of purchasing gas at fair and reasonable rates there must be some regulation of the producing company engaged in the interstate transportation and sale of gas. It is therefore the purpose of this legislation to close the gap now existing between Federal and State regulation and control and confer upon the Federal Power Commission the right, duty, and authority to exercise such regulatory power in fixing a fair and reasonable rate for gas that is a part of interstate commerce. It seeks to give similar power to regulate and control interstate commerce in gas as now exists in State regulatory bodies with respect to transactions entirely within the States.

"The enactment of this legislation is sought by the utility commissioners of the several States, by municipalities and States, and by the consuming public. It is meritorious and of a type that past experience has shown to be necessary in the public interest. There are also provisions within the proposed law that seek to provide some measure of

conserving the great natural-gas fields from unnecessary use and consequent waste."

P. 6723:

"Mr. HALLECK. Competition in this regard has been ineffective, and as a result, even though the prices of the distributing company to the consumers have been kept within reasonable limits, insofar as the activities of the distributing company are concerned, real protection has not been available to the ultimate consumer, because in many instances the transportation company, transporting in interstate commerce, has charged a rate which is higher than is deemed fair and reasonable."

P. 6725:

"Mr. CROSSER. This legislation will protect the public from being charged wholly unreasonable prices for gas. There should be no opposition to this bill. I hope that it will pass unanimously."

Mr. Kenny, p. 6726:

"Mr. KENNY. * * * The pending bill gives to the Federal Power Commission authority to sit as an independent board or with a State board as a joint board to enforce this act and to bring about regulation that will result, I believe, in an improvement of conditions and reduction of rates so that consumers in States using natural gas will have a fair and reasonable rate."

Mr. Poage, p. 6728:

"Mr. POAGE. * * * I think the bill clearly gives the commission the right to give relief to the domestic consumer, and not place the entire burden of paying a fair return on the entire investment on the domestic consumer. * * *"

81 CONG. REC'D, DEBATE IN SENATE ON H. R. 6586

Mr. Brown, p. 9317:

"The interest of the consumer is the interest we are protecting principally."

HEARINGS BEFORE THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, HOUSE, 75TH CONG. 1ST SESS. ON H. R. 4008

Statement of John E. Benton, Solicitor, National Association of Railroad and Utilities Commissioners, p. 23:

"Our thought is that some latitude can be allowed to the Federal Commission in using, in the public interest, the money which the Congress appropriates for the Federal Commission. It is money appropriated to be used to secure for the people of the United States efficient services at reasonable rates, and if it is used for that purpose it will be expended as Congress intended it to be expended; and no more can be expended than Congress has appropriated. I say that with respect to the words which I have italicized:"

Statement of Harry R. Booth, Acting Counsel for Ill. Commerce Comm. p. 24, pp. 24–25:

"It is my opinion that if Congress does not confer upon the Federal Power Commission the power promptly to control interstate natural gas wholesale rates, the people of Illinois may be compelled to pay, during the next 10 years, from 20 to 35 million dollars in excessive charges to the Natural Gas Pipe Line Co. of America. It is for

this reason that prompt and vigorous action upon the part of Congress is necessary.

"While I propose to limit my discussion primarily to the reasons why the enactment of H. R. 4008 is necessary and vital to protect the ratepayers in Illinois, I should like to comment briefly, first upon some of the broader problems, and then discuss certain amendments which I believe should be incorporated in the bill.

P. 27:

"The largest item of operating expenses of the Peoples Co. arises out of its annual payments for natural gas to the Chicago District Pipeline Co., which now approximate $13,000,000 per year. In its effort to determine whether the contracts between the Chicago District Pipeline Co. and the Natural Gas Pipeline Co. of America now place an unfair burden upon the consumers of the Peoples Gas Light & Coke Co., the Commission in November cited the Chicago District Pipeline Co. to show cause why its wholesale rates should not be reduced.

Pp. 38–39:

"The Chicago District Co.'s principal operating expense—and I am afraid I did not make this point clear, and I want to just clear that up—the commission in the *Chicago District Pipeline* case is confronted with the fact that its principal operating expense, over 95 percent of its operating expense, is the payments which it makes to the Natural Gas Pipeline Co. of America. It has indicated that it wants to see how much money the Natural Gas Pipeline Co. of America is now making out of the sale of gas to the Chicago Dis-

trict Pipeline Co., so that it can determine whether or not the operating expenses of the Chicago District Pipeline Co. are reasonable. If they are not reasonable, it may then—I do not know what it will do. If its position is sustained, it may then be in a position to reject part of the operating expenses of the Chicago District Pipeline Co. under the *Western Distributing Co.* case and order the Chicago District Pipeline Co. to file a new schedule of rates under which it sells gas to the Peoples Gas Light & Coke Co.; but it does not have the power to determine what the Natural Gas Pipeline Co. of America shall collect from the Chicago District Pipeline Co., and this bill presumably would confer upon the Federal Power Commission such authority."

P. 41:

"Mr. BOREN. Now, subsection (b) of section 5 of this bill sets up a system whereby the Federal Commission might run the errands for the State commissions, and I would like for you to give me your opinion on that subsection, as to what particular benefit that would be to the general welfare and why the Federal Government should take this additional burden which apparently belongs to the State Commissions?

"Mr. BOOTH. Well, I think that the provision is a desirable one. I think that our experience indicates that it is quite vital for the State commissions and the Federal Commission which regulates the same subject matter to work together in order that the public may receive the fullest possible protection.

* * * * *

"Mr. BOOTH. Certainly I believe that the States ought to do the job that is constitutionally and legally theirs, and what we would like to have done is to have the Federal Power Commission authorized to take over or given the authority to fix the interstate wholesale rates, so that the ultimate consumer can receive better protection."

P. 46:

"Mr. BOOTH. * * * I appreciate the courtesy you have given me, Mr. Chairman, and I want to again reemphasize the fact that in my judgment the enactment of this law with appropriate amendments is absolutely vital in order that the consuming public of natural gas or mixed natural and artificial gas be fully protected."

Pp. 56–57 (Letter of Slattery, Chairman, Ill. Commission):

"The largest item in the operating expenses of the People's Gas Light & Coke Co. is its payment for natural gas to Chicago District Pipe Line Co. This latter company is controlled by the People's Gas Light & Coke Co. and owns and operates a pipe line extending from some 40 miles away from Chicago to the Chicago city limits. Its operations are, therefore, intrastate. It purchases all of the natural gas which it transports from the National Gas Pipeline Co. of America, which is the interstate company transporting natural gas from Oklahoma to a point 40 miles distant from Chicago.

* * * * *

"If the pending bill is enacted into law, the Federal Power Commission would clearly have the right to examine into the profits of the Natural

Gas Pipeline Co. of America; and if such profits were found to be excessive, to modify the price accordingly. A reduction in price would be reflected directly in a lower cost of gas to the People's Gas Light & Coke Co., and, of course, a corresponding increase in their net operating income. Therefore, any reductions ordered would be a direct element in the determination of reasonable rates for the People's Gas Light & Coke Co. in the city of Chicago."

P. 70:

"Mr. SCHEER. Well, Mr. Halleck, we assume that legislation of this character is designed to correct—I believe we can assume that it is designed to correct abuses that now exist in this industry. It is the very judgment of the local authorities, in the power which they now have over such pipe lines, that they can require them to supply adequate service wholly within the State; and the local authorities can say what is adequate service.

"Mr. HALLECK. Of course I can understand that on the question of lowering rates where there is no competition, the assistance through Government regulation which would affect a revision of the rates downward would probably be helpful to the consumer more than to anyone else."

Statement of Robert D. Garver, Director, Kansas City Gas Co., p. 101 pp. 102–103

"Now if the city gate rate in Detroit is 33 cents, and if it is 40 cents in Kansas City, it would seem that the customers there would get the benefit of it. As I understand this bill the purpose is not to

see that the pipeline makes more money, or the distributor makes more money, but that the consumer is fairly treated and gets a reasonably low rate. As I say, if this statement is true, and the rate to the city gate at Detroit is 33 cents, and the rate to Kansas City is 40 cents, then let us see what the consumer pays.

* * * * *

"Three thousand cubic feet is the average consumption of the small consumer. The consumer, I suppose, is the one you are interested in protecting, and so I say that the statements that have been made in this respect regarding the rates at Detroit and Kansas City are misleading and do not reflect what the consumer pays. * * *"

Hearing on H. R. 11662, Subcommittee on Interstate and Foreign Commerce, House, 74th Cong. 2d Sess., April 1936

P. 25:

"Mr. COOPER. While you say we are not going to touch the retail rates, yet with the power you have it may have a very serious effect on the retail rates in the States.

"Mr. DEVANE. That is true and presumably it would be a very beneficial effect to the public."

P. 26:

"Mr. LEA. * * * The consumption in the State is secured largely through interstate transmission and the cost of the interstate production is, of course, a very material element in determining the price the local people must pay for their gas. So that if complete regulation is necessary, it would involve interstate regulation."

Pp. 34–35:

"Mr. COLE. Does this bill give anywhere the Commission power over the source of natural gas in the different fields in a manner which we might call comparable to that which your Commission now has over hydroelectric generating plants?

"Mr. DEVANE. It does not; no. It does not attempt to regulate the gathering rates or the gathering business. Section 11, I believe it is, of the bill deals with that.

"Mr. COLE. I do not want to disturb the continuity of your presentation, section by section.

"Mr. DEVANE. Well, I will get to that in a few minutes. But section 11 deals with State compacts, not in the sense of prescribing what State compacts should be but simply gives to the Commission authority to investigate and report to the Congress upon the State compacts that are submitted for approval. But the bill itself does not attempt to regulate either the gathering end or the distributing end of the business; I mean the local distribution of gas.

"Mr. COLE. Under the declarations of this bill, this particular industry is a public utility, coming under Federal regulation to try to assure consumers reasonable rates?

"Mr. DEVANE. Yes.

"Mr. COLE. And yet it attempts to do nothing to prevent the outrageous waste of natural gas which is going on every day, and is going on this very minute.

"Mr. DEVANE. It is a very shocking waste.

"Mr. COLE. Why do we attempt to approach this problem in this manner and at the same time

ignore any approach to the elimination of this shocking waste we all know about? We are dealing with consumers, going to assure the consumers reasonable rates, and yet we are going to tolerate this tremendous waste of the very resource which is declared to be a public utility, and in which we are going to assure reasonable rates to consumers. * * *"

A. R. McDonald, member of Wisc. Comm. and National Association of Railroad and Utility Commissioners; appearing as chairman of the standing committee on legislation of the National Association of Railroad and Utility Commissioners

P. 81:

"* * * What the distributing companies pay to the pipe-line companies for their supplies of gas enters into operating expenses. It is thus clear that the price at which the distributing company can be required to sell gas to the public must depend to a large extent upon the price it is obligated to pay the pipe-line company from which it purchases at wholesale."

In The

SUPREME COURT OF THE UNITED STATES
October Term, A.D. 1943

No. 1080 85

CENTRAL STATES ELECTRIC COMPANY,
Petitioner,

vs.

CITY OF MUSCATINE, IOWA

and

ELMER E. JOHNSON, pro se and for users of natural gas in the Town of Greenfield, Iowa, etal.

RESISTANCE TO PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR SEVENTH CIRCUIT.

ELMER E. JOHNSON,
Attorney for ~~Petitioner~~.
Respondent.

In The

SUPREME COURT OF THE UNITED STATES
October Term, A.D. 1943

No.

CENTRAL STATES ELECTRIC COMPANY,
Petitioner,

vs.

CITY OF ALGONA, IOWA,

and

ELMER E. JOHNSON, for himself and the users of natural gas in the Town of Greenfield, Iowa, et al.

RESISTANCE TO PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR SEVENTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now Elmer E. Johnson, for himself and as mayor of the Town of Greenfield, Iowa, for and on behalf of the users of natural gas in said town, and makes resistance to the petition of Central States Electric Company for a writ of certiorari asked of this Court. Resistance is made in two parts.

I.

That the fundamental part of this cause was decided by the United States Circuit Court of Appeals in its decree of September 3, 1942, of which cause the Central States Electric Company had notice and were a party. That this action ought not now be reviewed by your Court in this manner, for the reason that it is or ought to be barred by the Statute of Limitations.

II.

Subject to part I. above, resistance is made to the merits of the petition for a writ of certiorari filed by Central States Electric Company.

A. Respondent denies that Central States Electric Company, hereinafter called "Central", is entitled to the $25,705.54 fund involved as a matter of legal right, for Central did not pay excessive rates, but same were paid by the ultimate consumers of the gas sold by Central, and the Court has found the above amount to be the amount of over payment. Central just passed the charge on to the consumer. The lower Court has simply provided a method of recovery for the consumer, and I can not see where this conflicts with the authority cited by petitioner.

B. I can not see where the Court of Appeals is attempting or has attempted to regulate the contractual relations between the local distributors and the ultimate consumers. It has simply said that the Natural Gas Pipeline Company of America, et al, has over charged, for gas, and that the user of this gas is entitled to it. It has also provided a manner within the reach of the user to file his claim with his town for his money back. I can not see where this concerns Central. It appears to be fully within the provision of Section One of the Natural Gas Act as set out in the appendix of petitioners petition.

C. The Court of Appeals has done and is doing all it can to get this money paid to those rightfully entitled to it, and Central having no equities in this fund ought not worry about how the Court disposes of it. So far Central has made no offer to take the fund and pay it out to the consumer. This town of Greenfield Iowa is willing to try to do with the part of said fund due its consumers.

D. Respondent further urges in resistance all the grounds heretofore urged in his resistances filed with the Court of Appeals, which by reference are made part hereof.

Wherefore, he respectfully prays that Central's petition be dismissed.

Elmer E. Johnson,
Attorney pro se and for users
of Natural Gas in Town of
Greenfield, Iowa.
Respondent.